

No. 11179

United States
Circuit Court of Appeals
For the Ninth Circuit.

F. S. LACK,

Appellant,

vs.

WESTERN LOAN AND BUILDING COMPANY, a corporation,

Appellee.

SUPPLEMENTAL

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,

Central Division

FILED

FEB 14 1946

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States
For the Southern District of California
Central Division

In Equity No. 1301 Civil O'C

WESTERN LOAN AND BUILDING COMPANY, a Corporation,

Plaintiff,

vs.

F. S. LACK, PEARL ASSURANCE COMPANY,
LTD., a Corporation,

Defendants.

In Equity No. 84 S.D. Civil O'C

F. S. LACK,

Plaintiff,

vs.

WESTERN LOAN AND BUILDING COMPANY, a Corporation,

Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above entitled cause, No. 130 O'C Civil, Central Division, having been filed in this court, and the above entitled cause, No. 84 O'C Civil, Southern Division, having been commenced in the Superior Court of the State of California in and for the

County of Imperial, No. 19637, and thereafter removed to this court, and the said two causes having been consolidated and tried together before the Hon. J. F. T. O'Connor, Judge; and a Final Decree thereupon having been filed and entered on October 31st, 1941, in Civil Order Book for the Central Division, No. 7 at page 235 et seq., and in Civil Order Book for the Southern Division, No. 1 at page 482 et seq.; and, pursuant to said Decree, *inter alia*, the court having ordered that the \$28,-067.87 deposited into court by the Pearl Assurance Company, Ltd., a corporation, in [1] case No. 1301 O'C. Civil, Central Division, on January 29th, 1941, be paid to the Western Loan and Building Company, a corporation, of which said sum of \$28,067.87, less clerk's fees of one per cent amounting to \$280.68, or \$27,787.19, was paid by the clerk of the District Court to the Western Loan and Building Company, a corporation, on November 4th, 1941; and

The said F. S. Lack, the defendant in said cause No. 1301 O'C. Civil, Central Division, and plaintiff in said cause No. 84 O'C. Civil, Southern Division, having appealed from a part of said Decree, and from the order denying his Motion for a new trial, dated and filed March 13th, 1942, to the Circuit Court of Appeals for the Ninth Circuit, to the extent and as more fully set forth in the said Notice of Appeal, dated and filed May 1st, 1942; and the said United States Circuit Court of Appeals having rendered its Opinion, filed April 9th, 1943, in the said court, and reported in 134 Fed. Supp. 1017,

and having made its Decree reversing that part of the said judgment appealed from, and directing the entry of judgment in this court; and the said Mandate of said United States Circuit Court of Appeals for the Ninth Circuit in these two causes bearing date May 29th, 1943, having been duly transmitted to this court, and having been filed and spread on the minutes of this court on the 3rd day of June, 1943, decreeing that that part of the judgment of the said District Court in these two causes, so far as appealed from, be reversed with costs in favor of the appellant, F. S. Lack, and against the appellee, Western Loan and Building Company, a corporation, with directions to the District Court to enter judgment awarding to Western Loan and Building Company, a corporation, the sum of \$19,250.00 of the \$28,067.87 deposited into court by the Pearl Assurance Company, Ltd.; a corporation, and awarding to F. S. Lack the sum of \$8,817.87 of the said \$28,067.87, and requiring the Western Loan and Building Company, a corporation, to convey to F. S. Lack the [2] Hotel Dunlack Building in Brawley, California, the land on which the building stood, and affirming that part of the District Court's decree requiring the Western Loan and Building Company, a corporation, to convey and transfer to F. S. Lack all furniture, furnishings, fixtures and equipment, including linens, dishes, silver and restaurant equipment located in the building, and that the appellant, F. S. Lack, recover against the appellee, Western Loan and Building Company, a corporation, for his costs expended on appeal and

taxed by the Circuit Court of Appeals, the sum of \$1122.97; and

This Court having made its interlocutory decree dated December 20, 1943, entered and docketed December 20, 1943, in Book CO 22 at page 451, and having by orders denied all motions by F. S. Lack to amend or re-settle said decree and for other relief;

And said F. S. Lack having appealed from said interlocutory judgment and said orders in the manner and to the extent set forth in the notice of appeal dated and filed March 19, 1944, to the United States Circuit Court of Appeals for the Ninth Circuit, and the said United States Circuit Court having rendered its opinion filed December 30, 1944, in said Court, and having made its decree dismissing said appeal and the mandate of said United States Circuit Court in said causes bearing date of December 30, 1944, having been transmitted to this Court by the United States Circuit Court and said mandate having been duly spread on the minutes of this Court on the 25th day of June, 1945,

And the Court having heard and considered the arguments of counsel and being fully advised in the premises,

Now Upon Motion of Henry S. Dottenheim, attorney for F. S. Lack, Henry S. Dottenheim appearing of counsel for said F. S. Lack, and M. Perelli-Minetti appearing of counsel for Western Loan and Building Company, and no one else appearing, [3] the Court does in both of said consolidated cases

hereby make the following Findings of Fact and Conclusions of Law in place and in stead of the Findings of Fact and Conclusions of Law heretofore made and filed October 31, 1941, which are hereby vacated:

FINDINGS OF FACT

1. That hereinafter for convenience in these Findings F. S. Lack will be called "Lack," Western Loan and Building Company will be called "Western," and Pearl Assurance Company, Ltd., will be called "Pearl."

That by a certain lease and option, Lack's Exhibit A, made and entered into as of November 10, 1934, by and between Western as Lessor and Lack as Lessee, Lack leased from Western the Hotel Dunlack at Brawley, California, including land, building, furniture, furnishings, fixtures, and equipment, and the real estate upon said hotel rested, situate in the City of Brawley, County of Imperial, State of California, and described as follows:

Lots Fourteen (14), Fifteen (15) and Sixteen (16) in Block Seventy-nine (79) of the Townsite of Brawley, in the City of Brawley, County of Imperial, State of California, according to the Map thereof No. 920 filed in the office of the County Recorder of San Diego County.

for six years commencing on the first of January, 1935, and ending on the 31st day of December, 1940,

unless said term be sooner terminated as therein provided.

2. The rent for the premises as provided in said lease was as follows: The Lessee agrees to pay and the Lessor agrees to accept the following sums: Five Hundred Twenty-five and no/100 Dollars (\$525.00) on January 1, 1935; Five Hundred Twenty-five and no/100 Dollars (\$525.00) on April 1, 1935; Five Hundred [4] Twenty-five and no/100 Dollars (\$525.00) on July 1, 1935; Five Hundred Twenty-five and no/100 Dollars (\$525.00) on October 1, 1935; Fourteen Hundred and no/100 Dollars (\$1400.00) on January 1, 1936, and quarterly thereafter the sum of Eight Hundred Seventy-Five and no/100 Dollars (\$875.00) plus interest at the rate of six per cent (6%) per annum on the balance remaining under this lease; said rents falling due on the first day of January, April, July and October of each year until the expiration of this lease.

3. The said lease and option agreement, Exhibit A, granted to Lack an option to purchase the property heretofore described for \$35,000.00, upon the terms more fully and completely set forth in Exhibit A, but which were substantially as follows:

“At any time during the term hereof, provided that the Lessee shall not be in default in the performance of any promise, covenant or condition herein contained provided to be performed by the Lessee, Lessee is hereby granted the option to purchase said demised premises and properties from the Lessor for a purchase price of Thirty-five Thou-

sand and no/100 Dollars (\$35,000.00), together with interest thereon at the rate of six per cent (6%) per annum from the 1st day of January, 1936, to the date upon which the Lessee agrees to purchase said property in accordance with the terms of the said option. Said option shall be exercised by the delivery of written notice of the exercise thereof to the Lessor at the place where the rent hereunder shall be payable. * * *

"The purchase price shall be payable as follows: Seventeen Thousand Five Hundred and no/100 Dollars (\$17,500.00) of said purchase price and a sum equal to interest upon said purchase price at the aforesaid rate from January 1, 1936, until the date of the exercise of said option shall be paid by the lessee to the Lessor upon the [5] date the Lessee exercises his option to purchase said property. There shall be credited upon said payment and upon said purchase price all payments theretofore received by the Lessor from the Lessee as rental pursuant to the terms hereof. The balance of the said purchase price, together with interest thereon at the rate of six percent (6%) per annum from the date upon which the Lessee exercises the said option until the entire purchase price is fully paid, shall be payable in quarterly installments of Eight Hundred Seventy-five and no/100 Dollars (\$875.00) plus interest on balance due as above set forth, said payment being due and payable on the first day of January, April, July and October of each year until the whole purchase price has been paid. * * *

"The Lessor may deliver a good and sufficient deed to the Lessee conveying title to said property * * * Contemporaneously with the delivery of said deed, the Lessee, shall either pay the unpaid balance of the purchase price or execute and deliver to the Lessor his several promissory notes, payable to Western * * * in a sum equal to the unpaid balance of the purchase price with interest * * *."

4. Lack took possession of the property under the said lease on January 1, 1935, and continuously thereafter retained and now retains possession thereof.

5. Between January 1, 1935, and May 18, 1940, Lack made improvements on the building, expending more than \$18,000.00 therefor, and made each and every of the quarterly payments required of him during that period, to wit, the sum of \$15,750.00, which were applied by Western to the principal account and \$7,205.70 applied by Western to interest account up to July 1, [6] 1940, in all the sum of \$22,955.00, which from January 1, 1935, when the lease commenced, to May 18, 1940, when the earthquake occurred, was an average of \$358.68 per month during said period.

6. That Lack wrote a letter to Western on December 1, 1934, reading as follows:

"Upon request of Mr. Berdel, your San Diego agent, am submitting to you my understanding of the purchase by me of the Hotel Dunlack property, situate in Brawley, California. The executive board of Western accepted my written proposition for

the purchase of the property, and you were authorized by Salt Lake office to notify me to that effect and further told me I could go ahead and make purchase of new lobby furniture and rehabilitate the hotel, which I proceeded to do. I also signed the contract prepared by you for the purchase and executed and delivered a bill of sale to Western for the entire furnishings of the hotel, thereby complying with my part of the contract to the letter. * * * The question of taxes came up at the meeting of the executive board and you told them all taxes had been paid. However, that does not enter into it, for I purchased the property for a fixed amount. * * *"

7. Lack by said letter and by said policies described in Finding 12 hereof delivered to Western and accepted by them, gave written notice to Western of the exercise of the option contained in said lease to purchase said property, at least prior to the date of the earthquake, when the lease was concededly in good standing, and Lack exercised the option to purchase said property by the delivery of written notice to Western as aforesaid on or before April 26, 1939.

8. That on October 30, 1934, Lack issued and delivered to Western a bill of sale covering and describing the furniture, [7] furnishings and fixtures then in said hotel building.

9. That said bill of sale was not intended to convey title to said Western absolutely but only as security for the performance of the lease as to

the payments of the amounts therein defined as rentals, and all rentals required to be paid under said lease were paid by Lack and the personal property covered by said bill of sale belongs to Lack and is unencumbered by any claim of Western as security or otherwise.

10. That the said lease and option contained the following provisions:

“If the demised premises be damaged by fire or other casualty so that they cannot be repaired or restored within twenty (20) working days after possession is given to the Lessor for that purpose, then and in that event this lease shall terminate and the parties hereto shall be released from all obligations hereunder thereafter accruing, but if such damage can be repaired within said period of twenty (20) days then and in that event the Lessor shall repair said demised premises at its own cost and expense, provided that labor and materials can be obtained at the then prevailing rates, reasonable allowance being made for any delay from strikes or other causes beyond the control of the Lessor. No deduction or rebate in rent shall be allowed by reason of any such damage or destruction.”

11. That Western Loan and Building Company is a building and loan corporation duly organized under and by virtue of the laws of the State of Utah; that F. S. Lack is a resident of the State of California, and that defendant, Pearl Assurance Company, Ltd., is a corporation organized and existing under the laws of England; and that the

jurisdiction of the above entitled court is [8] conferred in both cases by virtue of the diversity of the citizenship of the parties and by virtue of the fact that the amount involved in the claims of the parties is more than Three Thousand Dollars (\$3,000.00) exclusive of interests and costs.

12. That Pearl on or about March 15, 1939, for a valuable consideration, duly issued and mailed to Western and delivered its insurance policy No. 514753, dated May 6, 1939, in the principal sum of \$15,000.00; and that on or about November 10, 1939, for a valuable consideration, duly issued and mailed to Western and delivered its insurance policy No. 515739, dated August 30, 1939, in the principal sum of \$12,000.00. Receipt of Policy No. 514753 was acknowledged by Western on April 26, 1939, and of policy No. 515739, on September 20, 1939, both in writing and by mail. That said policies covered and insured the hotel buildings owned by Lack, and situated on Lots 14, 15, and 16, in Block 79, Townsite of Brawley, in the City of Brawley, County of Imperial, State of California, in the said respective amounts against loss by fire and earthquake casualty. That Western Loan and Building Company was the assured named in said policies. Each policy provided:

“It is understood that F. S. Lack, hereinafter termed ‘vendee’, has an interest in the within described property by virtue of a contract of sale from Western Loan and Building Company of Salt Lake City, Utah, hereinafter termed ‘vendor’, * * * if

this policy be not payable to a mortgagee, trustee or beneficiary under a deed of trust, the proceeds of this policy subject to all its terms and conditions shall be payable to said vendor and/or said vendee as follows: (1) to said vendor to an amount not exceeding the balance unpaid at the time of loss upon the contract of sale above referred to, and (2) the balance, if any, to said vendee." [9]

13. That the damage to said hotel by reason of said earthquake is the sum of \$52,049.00 and that said damage could not be repaired within twenty days as contemplated by the said provision of said contract. That said property was so damaged and so far destroyed as to require much longer than twenty days to repair or restore the same. That such repair or restoration would and will require approximately three to five months. Except for this quoted provision all repairs to said leased property were required by the lease to be made by the lessee.

14. Said policies of insurance were furnished by Lack, who paid the premiums thereon, and who was entitled to the return premium after cancellation, and they were furnished to the Western Loan and Building Company pursuant to the Lease and Option agreement hereinafter referred to and by agreement and understanding between Lack and Western and were accepted by Western and held and relied on by it at the time of the earthquake herein referred to and at the time of the trial. That the said policies of insurance insured Western

against both fire and earthquake casualty. The Lease and Option Agreement hereinafter referred to recited with relation to said insurance as follows:

"All of said policies of insurance shall provide that loss thereunder shall be payable to the Lessor and shall be delivered to and held by the Lessor. The Lessor shall have full power to adjust, collect, receipt for and compromise any claims under any of said policies of insurance. Upon the failure of the Lessee to secure said insurance the Lessor is hereby expressly authorized to procure the same. The Lessee agrees to immediately remit to the Lessor the amount expended therefor."

15. That on May 18, 1940, an earthquake occurred at Brawley causing the said hotel building to be seriously damaged as and in the manner insured against by the defendant, assurance [10] company, in the said policies; at said time and at all the times herein mentioned plaintiff was the owner of said damaged property and the holder of said insurance policies, and same had been continued and at said time were in full force and effect and were hereafter by the insurer cancelled.

16. After the earthquake the damages so caused to the hotel building covered by said policies were determined and mutually agreed to by all the parties, plaintiff and defendant herein, as being the amount of \$52,049.00, and after deducting the amounts allowed by the policy agreements to be deducted from the face amounts of the policies by the defendant, assurance company, there became

and was due from said defendants, assurance company, under said policies, the sum of \$28,067.87. That the defendant, assurance company, deposited the said sum in the above entitled court and with the Clerk of said court in case No. 1301 disclaiming any interest therein and asking that the rights of Western and Lack as to said funds, be determined and that said amount be paid to the party entitled thereto, and that the said assurance company be discharged from further liability.

That F. S. Lack in case No. 1301 made claim to said insurance fund by reason of the alleged breach by Western of a provision of the Lease and Option agreement entered into by said Lack, as lessee, and Western, as lessor, November 10, 1934, covering and describing the hotel building and properties hereinabove described; and in case No. 84 the said F. S. Lack again alleged the breach of the same provision of said contract and prayed for a decree of specific performance requiring Western to repair the said premises, and to use the said insurance fund for said purposes, or for damages for the alleged breach of said provision by the said Western. That the said provision of said Lease and Option so alleged by Lack to have been breached, reads as follows:

“If the demised premises be damaged by fire or other casualty so that they cannot be repaired or [11] restored within twenty working days after possession is given to the Lessor for that purpose, then and in that event this lease shall terminate

and the parties hereto shall be released from all obligations hereunder thereafter accruing, but if such damage can be repaired within said period of twenty days then and in that event the Lessor shall repair said demised premises at its own cost and expense, provided that labor and materials can be obtained at the then prevailing rates, reasonable allowance being made for any delay from strikes or other causes beyond the control of the Lessor. No deduction or rebate in rent shall be allowed by reason of any such damage or destruction."

17. On May 18, 1940, the building was seriously damaged by an earthquake.

18. Between May 18, 1940, and July 1, 1940, Western and Lack submitted to Pearl a joint proof of loss and Western's agent told Lack that he need not make any payments falling due under the contract after May 18, 1940; that Western and Lack "could settle that up" after they received the proceeds of the insurance policy.

19. That Lack made no further payments except as hereinafter set forth after the earthquake.

20. On September 11, 1940, Western, Lack, and Pearl executed an agreement determining the extent of the damage to the building. In that agreement Western and Lack described themselves as vendor and vendee and in that agreement Lack, Pearl and Western mutually agreed that the damages so caused by the earthquake were in the amount of \$52,049.00, and after deducting the amounts allowed by the policy agreements to be de-

ducted from the face amounts of the policies by the defendant, assurance [12] company, there became and was due from said defendant, assurance company, under said policies, the sum of \$28,067.87. That the defendant, assurance company, deposited the said sum in the above entitled court and with the Clerk of said court in case No. 1301 disclaiming any interest therein and asking that the rights of Western and Lack as to said funds, be determined and that said amount be paid to the party entitled thereto, and that the said assurance company be discharged from further liability.

21. That Western at all times since the earthquake repudiated said option agreement and refused to be bound by the terms thereof upon the ground that the same had never been exercised by Lack up to the time of the earthquake and that at the time of the earthquake the lease and option had terminated and therefore Lack never became entitled to exercise the option and Western claimed throughout the trial that the option was at an end and that Lack had no rights in the real estate, the subject matter of the lease.

22. At the close of the trial, after this Court had ruled that Western was under no duty to repair the hotel and that it was not incumbent upon it to contribute any money towards its repair, Lack acquiesced in the ruling of the Court and by his counsel demanded that the hotel be conveyed by Western to him in its unrepairs condition and that the Court might take the unpaid balance of the

purchase price, namely, \$19,250.00 out of the said insurance fund then deposited in the Court amounting to \$28,067.87.

23. Western then and there reiterated its refusal to make such a conveyance, claiming the property, the insurance fund, and all improvements as its property and again repudiating the option agreement.

24. From January 1, 1935, to May 18, 1940, the date of the earthquake, the operations of the hotel produced a net profit of \$900.00 per month, after deducting all principal [13] payments, taxes, insurance, and operating costs as shown by Lack's original ledger and journal, received in evidence in his behalf for this purpose, being Lack's Exhibits L and M.

25. These net profits were admitted by Western.

26. The payments of principal were capital expenditures by Lack and are to be regarded as additional net profits earned by Lack in the operation of the hotel, so that the average net profits earned by Lack in the hotel from its operation from January 1, 1935, to May 18, 1940, was the sum of \$1258.68 per month, or a total for said period of \$81,039.52.

27. That on or about August 3, 1943, pursuant to the order of this Court, Western delivered its grant deed in the usual form conveying to Lack the real property described herein and has since delivered to Lack the title insurance policy required

by the terms of the contract of option, and has delivered to Lack a bill of sale to the furniture and furnishings contained in said hotel.

28. That had Western delivered a deed to the hotel when it was demanded at the end of the trial on October 3, 1941, Lack could have had the property repaired within from three to five months as heretofore found and assuming that it would have taken the maximum of five months, could have had the property repaired and in condition to operate as a hotel on or before March 3, 1942.

29. Not having received the deed until August 3, 1943, he could not have had the property repaired, giving Western the maximum credit again, until January 3, 1944.

30. That Lack has been damaged by the withholding of said deed and the acts of Western as aforesaid by losing his profit in the operation of said hotel for the period of March 3, 1942, to January 3, 1944, at the rate of \$1258.68 per month, or a total sum of \$27,690.96, with interest thereon from the average date between March 3, 1942, and January 3, 1944, to wit: February [14] 3, 1943, to June 25, 1945, at 7% per annum, to wit, the sum of \$4841.05, in all the sum of \$32,532.01.

31. That the costs required to be paid by the mandate of the United States Circuit Court in the sum of \$1122.97, have been paid by Western.

32. That on November 13, 1941, and pursuant to the original decree herein filed, interest from

October 31, 1941, has been reversed as aforesaid by the Circuit Court of Appeals and Western withdrew from the registry of this Court the sum of \$28,067.67 deposited by Pearl in the registry of this Court, less the Clerk's fee amounting to \$280.67, or in all the sum of \$27,787.20; that by the decree of the Circuit Court Lack is entitled to \$8,817.87 less Clerk's fees amounting to \$88.17, or in all \$8729.70, out of said moneys to withdrawn from the registry of the Court by Western.

33. That Western paid Lack the sum of \$8729.70 on August 13, 1943, by issuing and delivering to Lack its certified check dated August 6, 1943, payable to F. S. Lack, John L. Schaefer and Henry S. Dottenheim, his attorneys, and Lack has since received the proceeds of said check.

34. That interest on said sum of \$8729.70 from November 4, 1941, to August 13, 1943, at the rate of 7% per annum is the sum of \$1134.28; that the interest on \$1134.28 from August 13, 1943, to June 25, 1945, is the sum of \$145.55, or in all the sum of \$1279.83, with interest from June 13, 1945, at 7% per annum.

CONCLUSIONS OF LAW

1. Pearl is entitled to an order and judgment herein, discharging it from all further liability to Western or Lack under its said insurance policies Nos. 514753 and 515739.

2. That Lack is entitled to judgment quieting title in him free and clear of any claim by Western,

to all of the furniture, furnishings, linens, restaurant equipment and silverware, dishes, [15] and all personal property in said leased premises on October 30, 1934, together with the additions and replacements to the same and all personal property in said buildings, and Western is not entitled to any of said personal property and is further entitled to a judgment quieting in him free and clear of any claim by Western, the property described as Hotel Dunlack at Brawley, California, including land, building, furnishings, furniture, fixtures and equipment, and the real estate upon said hotel rested, situate in the City of Brawley, County of Imperial, State of California, and described as follows:

Lots Fourteen (14), Fifteen (15) and Sixteen (16) in Block Seventy-nine (79) of the Townsite of Brawley, in the City of Brawley, County of Imperial, State of California, according to the Map thereof No. 920 filed in the office of the County Recorder of San Diego County.

3. That he is entitled to judgment vacating the Findings of Fact and Conclusions of Law hereinbefore referred to dated October 31, 1941, and filed on the same day, and vacating the decree dated October 31, 1941, and entered October 31, 1941, and docketed on the same day in Book CO 7, page 235, and Book CO 1, page 482.

4. That Lack exercised the option to purchase the Hotel Dunlack as hereinbefore set forth in these Findings, prior to the earthquake in the year 1939,

and at the date of the trial herein, was entitled to the conveyance of said hotel with all its furnishings, furniture and fixtures at the date of the earthquake, May 18, 1940.

5. That on or about October 31, 1941, and upon the trial of this action, Lack was entitled to a conveyance to the hotel property which Western refused to convey and at said time and at all times during said trial Western refused to be bound by said option [16] and repudiated the same.

6. That Lack is entitled to recover as damages the profits which he would have made in the hotel from March 3, 1942 to January 3, 1944 at \$1258.00 per month, or in all the sum of \$27,690.96, and that Lack is entitled to judgment against Western for said sum of \$27,690.96, with interest thereon from February 3, 1943 to June 25, 1945 at 7% per annum, to wit, the sum of \$4841.05, or in all the sum of \$32,532.01.

7. That said F. S. Lack is entitled to judgment quieting title in him free and clear of any claim by Western Loan and Building Company, to all of the furniture, furnishings, linens, restaurant equipment and silverware, dishes and all personal property in said buildings, and Western Loan and Building Company is not entitled to any of said personal property, and is further granted a judgment quieting in him free and clear of any claim by Western Loan and Building Company, the property described as Hotel Dunlack at Brawley, California, including land, building, furnishings, furniture, fix-

tures and equipment, and the real estate upon said hotel rested, situate in the City of Brawley, County of Imperial, State of California, and described as follows:

Lots Fourteen (14), Fifteen (15) and Sixteen (16) in Block Seventy-nine (79) of the Townsite of Brawley, in the City of Brawley, County of Imperial, State of California, according to the Map thereof No. 920 filed in the office of the County Recorder of San Diego County.

8. That F. S. Lack has been damaged by Western Loan and Building Company on account of the facts set forth in the findings, in the sum of \$27,690.96, with interest thereon at the rate of 7% per annum from February 3, 1943 to June 25, 1945, to wit, the sum of \$4841.05, or in all the sum of \$32,532.01. [17]

9. That F. S. Lack is entitled to judgment against Western Loan and Building Company in the sum of \$27,690.96, together with interest at the rate of 7% per annum from February 3, 1943 to June 25, 1945, to wit, the sum of \$4841.05, or in all the sum of \$32,532.01, and that said F. S. Lack have execution therefor.

Dated, this 25 day of June, 1945.

.....
Judge of the United States
District Court. [18]

[Endorsed]: Filed July 9, 1945.

Received copy of the within Findings of Fact and Conclusions of Law this 20th day of June, 1945.

H. L. MULLINER &
M. PERELLI-MINETTI

By M. PERELLI-MINETTI

Attorney for Western Loan & Building Co., Plaintiff and Defendant

[Endorsed]: Filed July 9, 1945.

[Title of District Court and Causes.]

SUPPLEMENTAL DESIGNATION OF
RECORD

To the Clerk of the Above Entitled Court:

In the above actions consolidated in the trial Court, F. S. Lack having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit and having heretofore filed in this Court on behalf of said F. S. Lack his "Designation of [20] Contents of Record upon Appeal," dated October 3, 1945, and having also filed in this Court a written stipulation between the parties concerning said record, which stipulation is dated October 23, 1945, now calls to your attention an omission from said record as certified by you to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit. Said omission being as follows: There is not contained in said record as certified by you to said Clerk, the proposed Find-

ings of Fact and Conclusions of Law proposed on behalf of Lack and rejected by the Court on July 2, 1945, as specified in Designation No. 5 in Lack's Designation and in Designation No. 2 in said stipulation.

Now Therefore, this supplemental designation to include in said transcript and as a part of said record the proposed Findings of Fact and Conclusions of Law offered on behalf of F. S. Lack and rejected July 2, 1945, is hereby requested of you and you are requested to certify the same as a supplemental transcript to the Clerk of said United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 2nd day of January, 1946.

HARRY W. HORTON,
Attorney for Appellant, F. S.
Lack.

(Affidavit of Service by mail attached.) [21]

[Title of District Court and Causes.]

CLERK'S CERTIFICATE TO SUPPLEMENTAL TRANSCRIPT

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 22, inclusive, contain full, true and correct copies of Proposed Findings

of Fact and Conclusions of Law filed July 2, 1945, and Supplemental Designation of Record which constitute the supplemental transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing supplemental transcript amount to \$5.20 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 9th day of January, 1946.

[Seal] EDMUND L. SMITH,
Clerk.

By THEODORE HOCKE,
Chief Deputy Clerk.

[Endorsed]: No. 11179. United States Circuit Court of Appeals for the Ninth Circuit. F. S. Lack, Appellant, vs. Western Loan and Building Company, a corporation, Appellee. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed January 10, 1946.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

